United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

18CF

BRIEF FOR APPELLANT

437

SAMUEL B. LEWIS, JR.,	)	
	)	
Appellant	)	
	)	
vs.	)	No. 20133
	)	
U. S. A.,	)	
	)	
Appellee	)	

APPEAL FROM JUDGMENT OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

February 25, 1967

Sol Zalel Rosen, Esq.
1718 Eye Street, N.W.
Washington, D. C. 20006

Attorney for Appellant

TABLE OF AUTHORITIES

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Statement of Questions Presented

Whether the trial court erred in admitting into evidence a handwriting sample taken from the defendant after his arrest and prior to his appearance before a Commission or Magistrate in violation of Rule 5a of Federal Rules of Criminal Procedure.

Whether the identification of the defendant by the complaining witness was adequate to send the case to the jury for its consideration.

Whether the trial court erred in admitting into evidence a card that contained the handwriting of the defendant which is the property of the Probation Department and which indicated the prior criminal record of the defendant.

Whether the trial court erred in admitting into evidence a handwriting sample prepared in violation of the defendant's right to counsel as guaranteed by the 6th Amendment and in violation of his privilege against self-incrimination as guaranteed by the 5th Amendment.

I.

Jurisdictional Statement

The jurisdiction of the court is involved under 28 U.S.C 1291. The Grand Jury returned a three count indictment, charging the defendant with assault with intent to commit robbery while armed with a pistol, assault with a dangerous weapon and assault with intent to commit robbery. It was alleged that these offenses occurred on October 6, 1964 in Washington, D.C. The defendant was tried before the Hon. Joseph C. McGarraghy and on February 3, 1966 he was gound guilty as indicted by the jury on all counts of the indictment. On March 11, 1966, he was sentenced to a term of 5 to 15 years on Count One of the indictment, 20 months to 5 years on Count Two of the indictment and 40 months to 10 years on Count Three of the indictment, all to run concurrently with each other. On April 6, 1966, the defendant was granted leave to appeal as a pauper by the District Court.

II.

Statement of the Case

On December 18, 1964, the appellant was arrested at his home and charged with violating the Washington D.C. code pertaining to assault with a dangerous weapon and assault with intent to commit robbery. A hearing was held on December 19, 1964 and the defendant was held in lieu of a $5000 bond for the action of the Grand Jury. On February 8, 1965, a three count indictment was returned by Grand Jury. On February 12, 1965, he was arraigned in the U.S. District Court for the District of Columbia and pleaded not guilty. He was tried before the Hon. Joseph McGarraghy on February 3, 1966 and was found guilty as charged by the jury. He was sentenced and is currently incarcerated in Lorton Reformatory awaiting the determination of his appeal.

The Government's case was put on through the following witnesses: Mrs. Lillian Hemminger (Tr. 65, 275-279), Mrs. Marie Farran (Tr. 67-85H), Detective Sherwood Herring (Tr. 85H-111, 125-129), Detective Robert Jones (Tr. 111-124, 148-168), Herbert Vogt (Tr. 168-175) and James Miller (Tr. 175-275).

Mrs. Lillian Hemminger was the first witness for the Government. She testified that on October 6, 1964, she was employed as a clerk-typist at the Federal Lithograph Company on Blair Road in Washington, D. C. On that day an individual came to her office and asked for an application for employment. After being informed that there were no positions available he left the place of business. He returned 10 minutes later and attempted to rob the Federal Lithograph Company. During the course of this attempt, several shots were fired at her and her co-worker. She identified the appellant as the person who attempted to rob her. It was also determined that on a prior occasion she identified someone else as the robber.

Mrs. Elizabeth Farran was the next witness for the Government. She stated that she was employed with Mrs. Hemminger at the Federal Lithograph Company. She also stated that the appellant was the man who attempted to rob the Lithograph Company but also stated that on prior occasions, she and Mrs. Hemminger identified another person as the individual who sought to rob the place. She stated that another individual was selected out of a lineup as the individual who attempted to rob the Lithograph Company.

Detective Sherwood Herring of the Metropolitan Police Department was next called as a witness for the Government. He stated that in response to a radio call he and Detective Jones went to the Lithograph Company. He and his partner, who serve on the robbery squad were in charge of the

case and investigated the case. Detective Herring stated that when he spoke to Mrs. Hemminger she stated that the man who sought to rob her was clean shaven, no mustache and had smooth skin, shiny (Tr. 91). Mrs. Farran agreed with this description. Both also agreed that the man who allegedly committed this act had medium brown complexion (Tr. 93) and no mustache. He also stated that an individual named Richard Shengler was charged with this offense but that the charges were dropped.

Detective Jones was the next witness for the Government. He testified as to the handwriting sample card which the defendant prepared after his arrest and prior to his appearance before a Magistrate or Commissioner. This testimony was offered out of the presence of the jury. He stated that this was done at the time of the defendant's arrest (Tr. 159).

Mr. Herbert Vogt of the Probation Department of the U.S. District Court was called as the next witness for the Government. He testified that a certain card which he possessed was written by the defendant Samuel Lewis, whom he supervised at one time.

Mr. James T. Miller, a handwriting expert, testified for the Government that he compared the handwriting sample of the defendant with the various samples given to him for analysis by the Government, including the handwritten sample made after the arrest of the defendant, the handwriting sample of the probation department and the handwriting of the job application. He testified that the Government's case would be weaker but for the handwriting sample of the defendant made after his arrest (Exhibit #3, Tr. 255-56). He stated that it was his opinion that the defendant was the person who completed the employment application at the Lithograph Company.

The Defense placed two witnesses on the stand, Mrs. Barbara Lewis, wife of the defendant (Tr. 285-289) and the defendant Samuel Lewis (Tr. 289-318).

Mrs. Lewis testified on behalf of the defendant that at the time of his arrest he was employed at the Washington Sanitation Department and that he has always wore a mustache and had a scar on his chin.

Mr. Lewis testified that he was not apprised of the charges against him until December 18, 1964, when he was arrested. He stated that on the day in question he did not go into the Federal Lithographing Company and attempt to rob the company. He stated that he was at work on the day of the robbery, but couldn't remember at which job because of the fact that he was employed at three different jobs.

A stipulation was read into the record that on November 1, 1961, an individual named Richard Shengler was arrested for a different offense and was subsequently identified by the complainants as the person who tried to rob them on October 6, 1964. Mr. Shengler was subsequently charged as the person who tried to rob the Lithograph Company but that the charges were later dropped.

Mr. John Brusnighan was called by the Government as a rebuttal witness (Tr. 334-339). He stated that he was employed by the Washington Sanitation Department and that the records that company show that the defendant was not employed on October 6, 1964, because of a sick leave.

Statement of Points

I.

The trial court erred in admitting into evidence a handwriting sample taken from the defendant after his arrest and prior to his appearance before a U.S. Commissioner or Magistrate in violation of Rule 5a of the Federal Rules of Criminal Procedure.

II.

The trial court erred in admitting into evidence a handwriting sample prepared in violation of the right to counsel of the defendant as guaranteed by the 6th Amendment and the privilege against self incrimination as guaranteed by the 5th Amendment.

III.

The trial court erred in admitting into evidence a card that contained handwriting samples of the defendant, which was the exclusive property of the Probation Department of the U.S. District Court which indicated the prior criminal record of the defendant.

IV.

The identification of the defendant was not sufficient to justify the trial courts in submitting the case to the jury for its deliberation.

Summary of Argument

The trial court erred in admitting into evidence a handwriting sample which the defendant prepared after his arrest but prior to his appearance before a U.S. Commissioner or a Magistrate, pursuant to Rule 5a of the Federal Rules of Criminal Procedure. That Rule, prohibits the use of confessions or statements prepared in violation of that rule. Thus the court should have sustained the objection to the introduction of the evidence.

The trial court erred in admitting the handwriting sample which was secured in violation of his privilege against self incrimination as guaranteed by the 5th Amendment and the right to counsel as guaranteed by the 6th Amendment.

The trial court erred in admitting into evidence a written card prepared by the Defendant which was in custody of the Probation Department of the U.S. District Court. This card reveals the ownership of the card and thus indicates to the jury the fact that the defendant has a prior criminal record. Thus the Goverment was able to attach the credibility of defendant illegally and without reference to the fact that the defendant had not testified in his own behalf.

The identification was less than satisfactory to submit the case to the jury. The evidence brought forth in the Government's case revealed that the complainants identified another individual as the man who sought to rob them. Moreover, there was also variance between the description given to the Police as to the facial characteristics of the defendant and the testimony given at the trial such that the court should have granted a dismissal at the close of the Government's case for failure to prove the element of identification beyond a reasonable doubt.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A HANDWRITING SAMPLE TAKEN FROM THE DEFENDANT AFTER HIS ARREST AND PRIOR TO HIS APPEARANCE BEFORE A U.S. COMMISSIONER OR MAGISTRATE IN VIOLATION OF RULE 5a OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

It is the contention of the appellant that the admission into evidence of a handwriting sample, exhibit #3, over objection of the defense (Tr. 149) was an error and that the conviction should be reversed for a new trial. The card was prepared in violation of the rights of the defendant pursuant to Rule 5a of the Federal Rules of Criminal Procedure. Detective Jones testified that the defendant Lewis was arrested on December 18, 1964, and was brought to the Robbery Squad Office. The handwriting card was prepared at 10:45 P.M. (Tr. 121). The witness testified that the defendant was brought to the Robbery Squad Room at 10:25 P.M. (Tr. 121, 133). The defendant was not brought before a Commissioner as required by Rule 5a of the Federal Rules of Criminal Procedure; Mallory v. U.S. 354 US449; cf. Jones v. U.S. AppDC 256, 307 Fnd 397(1962), Naples v. U.S. 113, USApp DC 281, 307 Fnd 618 (1962), to ascertain if there was probable cause to hold him for the action of the Grand Jury. (See also: Mitchell v. U.S., 114 USAppDC 353, 316 Fnd 354 (1963); Coleman v. U.S., 114 USAppDC 188, 313 Fnd579 (1962). It was also determined that the defendant was arrested at 10:00 P.M. on a warrant issued by the U.S. Commissioner for the District of Columbia. Detective Jones also stated that this handwriting sample is not ordinarily filled out by prisoners (Tr. 122), so that the interrogation and preparation of the handwriting card was for the production of evidence. Cf Greenwell v. US 119 USAppDC 43, 336 Fnd 1962.

It is submitted that because of the Mallory rule violation the court erred in admitting into evidence the handwriting sample, Exhibit #3. The Mallory case has been interpreted as forbidding any delay between arrest and presentment before a committing Magistrate, except delay that can be justified by the Police upon certain established grounds. See Seals v. U.S. 119 USAppDC 79, 325 Fnd 106 (1963).

Delay in Presentment of one or two hours can be justified for the purposes of "booking" the accused (Cf. Goldsmith v. U.S. 107 USAppDC 305, 277 Fnd 335 (1960)) but it cannot be used solely for the purpose of interrogating the accused (Cf. Coleman v. U.S., Supra, Jackson v. U.S., 106 USAppDC 396, 273 Fnd 521 (1959). In the case at hand there was a delay in bringing the defendant to answer before the U.S. Commissioner until December 19, 1965, which was the day subsequent to his arrest. Moreover it was clear that he was taken to the Robbery Squad Room and interrogated for at least 20 minutes while preparing a document that was called a "silent confession" by the government. It is the contention of the defendant that the Mallory rule was violated in the following respect:

(1) The interrogation of the Police and the preparation of the handwriting card were made during a period of illegal delay as prohibited by rule 5a of the Federal Rules of Criminal Procedure. The minimum time of interrogation, that of 20 minutes to prepare the handwriting sample was clearly in violation of the doctrine of the Alston case (121 US AppDC 66, 348 Fnd 72 (1965) where the Court of Appeals held that a 5 minute delay was unreasonable. The evidence was brought out that the defendant was not brought before a Magistrate until the next day.

(2) The preparation of the handwriting sample card, which the government acknowledged was not something that was prepared in the normal cause of arresting a suspect or the administrative machinery needed to bring a person before the courts. In Bynum v. U.S., 104, USAppDC 368, 362 Fnd 465 (1958), this court held that rule 5a was violated by an unnecessary and unaccounted delay in the taking of the fingerprints of the accused. In Perry v. U.S., 118 USAppDC 360, 336 Fnd 748 (1964), the Court of Appeals held that it was improper to admit into evidence a so-called "narcotics" slip prepared by the defendant in violation of Rule 5a. It is submitted that in light of the fact that the handwriting card was not prepared in the normal course of Police administration of suspects and in light of the rationale of Bynum and Perry cases, the evidence should have been supressed. If fingerprints and narcotic slips cannot be served during the period of delay, then surely a handwriting card cannot be admitted into evidence if secured in violation of Rule 5a and the Mallory rule.

II.

THE TRIAL COURT ERRED IN ADMITTING THE HANDWRITING SAMPLE WHICH WAS SECURED IN VIOLATION OF HIS PRIVILEGE AGAINST SELF INCRIMINATION AS GUARANTEED BY THE 5th AMENDMENT AND THE RIGHT TO COUNSEL AS GUARANTEED BY THE 6th AMENDMENT.

It is the contentinn of the defendant that the securing of the handwriting sample and its subsequent use as evidence in the trial was in violation of the right guaranteed by the 5th and 6th Amendment to the Constitution to the defendant-petitioner Samuel B. Lewis. It was ascertained by the Record that the defendant was arrested at his house pursuant to an arrest warrant possessed by the Police. The arresting officer stated that they advised the defendant of his right to counsel and right to remain silent (Tr. 122). Moreover the defendant stated that he had asked his wife to call his lawyer, who would advise him of his right. It is clear that at that point the right to counsel attached, as was stated by Mr. Justice Goldbert in Escobedo v. Illinois, 378 US 478 (1964), at 490:

> "We hold, therefore, that where, as here the investigation is no longer a general inquiry into an unsolved crime but has begun to form on a particular suspect, the suspect has been taken into police custody, the police carry out a process interrogation that lends itself to eliciting incriminating statements, the suspect has requested and has been denied an opportunity to consult with his

> lawyers and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance' of counsel in violation of the 6th Amendment to the Constitution as made....and that no statement elicited by the police during the interrogation may be used against him at the trial...."

It is the contention of appellant that since the right to counsel attached at the time of his arrest, the handwriting sample was illegally prepared and should not have been made without advice of counsel. The request made by the police was in violation of his right to be advised on the preparation of evidence which could be used against him. Thus the trial court erred in ruling that he did not have to be advised of his right to counsel and his right to silence (Tr. 158). Moreover, since the defendant was asked to prepare evidence which could be used against him, after his arrest and warning of right to silence, his privilege against self incrimination were violated. The limited case law from other jurisdictions is in accord with the above statement. Cf. - Dean v. U.S. 246F568, 577 (5th Circ. US Ct. of Appeals); Kennison v. State, 97 TexCrimRep. 514, 260 SW174; Blacksheir v. State (1933) 123 TexCrim 111, 58SW2 105. Belham v. Samson & Jose 53 Phil Island Rep. 570. The U.S. Ct. of Military Appeals has reached a similar result in U.S. v. Rosato 305CMA 143, 11CMR143; U.S. v. Eggers 3 Ct SCMA 191, 11 CMR 191 (1953). Thus it was in error in light of the above authority, to admit into evidence a handwriting sample taken from the defendant in violation of the 5th and 6th Amendment.

III.

> THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A WRITTEN CARD PREPARED BY THE DEFENDANT WHICH WAS IN CUSTODY OF THE PROBATION DEPARTMENT OF THE U.S.DISTRICT COURT. THIS CARD REVEALS THE OWNERSHIP OF THE CARD AND THUS INDICATES TO THE JURY THE FACT THAT THE DEFENDANT HAS A PRIOR CRIMINAL RECORD. THUS THE GOVERNMENT WAS ABLE TO ATTACH THE CREDIBILITY OF DEFENDANT ILLEGALLY AND WITHOUT REFERENCE TO THE FACT THAT THE DEFENDANT HAD NOT TESTIFIED IN HIS OWN BEHALF.

It is the contention of the appellant that the admission into evidence of Government Exhibit 4a over objection of the defense (Tr. 274) was error and is grounds for reversal. Government Exhibit 4a was a handwriting sample made by the Defendant to Mr. Herbert Vogt, the Probation Department of the U.S. District Court for the District of Columbia. This was later used by the handwriting expert as basis of comparison of the handwriting on the job application allegedly given to the complainants Mrs. Farran and Mrs. Hemminger. It is the contentinn of the defense that the trial court erred because of the inherent prejudice to the rights of the defendant to a fair trial was advanced by the Government exhibit. Initially it should be noted that the form is confidential as are any statements made by defendant to the Probation Department for its use in the preparation of a presentence report Rule 32 (c) FRCP US. Thus, by using this information over objection there was a clear violation of the Federal Rules.

In addition, the court should note that the use of this data is in conflict with the mandate of the Barnes Case (No. 14313, May 3, 1966). In that case the Court of Appeals reversed a conviction because of the introduction into evidence of a "mug" photograph of the defendant even though the number and identity were blanked out by the use of tape. The Court found that the defendant Barnes was prejudiced because the photo showed a prior criminal record, in violation of the D/P Clause of the 5th Amendment. Cf. Luck v. U.S., 121 Fnd 151, 348 Fnd 763 (1965); Brown v. U.S., USAppDC ____ Fnd, ____ (1967). In the case at hand the Government sought to block out information on the form which it was felt would have indicated that it was a probation report and used in a prior criminal case of the defendant. It is submitted that the Government was not successful in this endeavor. A reading of the evidence shows that it is possible to note that it is an official Government form used by the Probation Department of the U.S. District Court. It is submitted that this critical piece of evidence conveyed to the jury the prior criminal record of the defendant and thus deprived him of D/P of law as guaranteed by the 5th Amendment to the Constitution. In the Luck and Brown cases, supra, the Court of Appeals restricted the use of a criminal record of a Department. It can be used only for impeachment purposes and only when a defendant elects to take the witness stand to testify in his own behalf. However in the case at hand the Government used evidence of a past conviction as part of its main case, in violation of the 5th Amendment to the U.S. Constitution. It is a basic principle of law that a past criminal record of a defendant cannot be used as a basis for another criminal prosecution. Cf. Michaelson v. U.S. 335 US 468, (1948); Marshall v. U.S. 360 US 310 (1959). In the recent case of Spencer v. Texas, US S.Ct. Oct. 1966 Term, No. 68 & 70, the majority, Minority and concurring opinion held that in criminal prosecution in federal courts, the prosecution cannot, in any manner, allude to the criminal record of the defendant as part of its case. The Federal Appellate Courts have reached the same conclusion. See: Lovely v. U.S. 169 Fnd 586, 1948 (CA, 4th Cir.); Raillon v. U.S. 127 Fnd 691, 693 CA 5th (1948); Tedesco v. U.S., 118 Fnd 737 C.A. 9th (1941); U.S. v. Jacangelo 281 Fnd 574, CA 3rd Cir. (1960). In light of the overwhelming law on this point it was error to admit into evidence the card that revealed the prior record of the defendant.

Thus, the court erred in admitting this document into evidence and the court should reverse the conviction on those grounds.

IV.

THE IDENTIFICATION WAS LESS THAN SATISFACTORY TO SUBMIT THE CASE TO THE JURY. THE EVIDENCE BROUGHT FORTH IN THE GOVERNMENT'S CASE REVEALED THAT THE COMPLAINANTS IDENTIFIED ANOTHER INDIVIDUAL AS THE MAN WHO SOUGHT TO ROB THEM. MOREOVER, THERE WAS ALSO VARIANCE BETWEEN THE DESCRIPTION GIVEN TO THE POLICE AS TO THE FACIAL CHARACTERISTICS OF THE DEFENDANT AND THE TESTIMONY GIVEN AT THE

TRIAL SUCH THAT THE COURT SHOULD HAVE GRANTED A DISMISSAL AT THE CLOSE OF THE GOVERNMENT'S CASE FOR FAILURE TO PROVE THE ELEMENT OF IDENTIFICATION BEYOND A REASONABLE DOUBT.

It is submitted that the Government failed to sustain its burden of proof on the issue of identification of the defendant and erred in submitting the case to the jury. It is a principle of law that the identification of the defendant is a separate element of the offense must be proved beyond a reasonable doubt. In the case at hand there was too much confusion by the Government witnesses regarding the identify of the person who attempted to rob the Lithograph Company to justify the trial court submitting the case to the jury. The evidence revealed that the two complainants identified another individual, as the person who entered the Lithograph Company. That individual was charged with the crime. However, the charges were dropped. Moreover, there was a conflict between their testimony at the trial and the description given to the police after the crime was committed regarding such facial features as a mustache and a scar. This should have created doubt in the mind of the trial judge as to the quality of the identification of the defendant so as to grant an acquittal at the close of the Government's case. Thus, the trial court error is grounds for reversal of the conviction of the defendant.

APPENDIX

Statutes

Rule 5a of Federal Rules of Criminal Procedure

An officer making an arrest issued upon a complaint or any person making an arrest w/o a warrant shall take the arrested person without unnecessary delay before the nearest available Commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a Commissioner or other officer a complaint shall be filed forthwith.

22-501 of the District of Columbia Code

Every person convicted of any assault with intent to kill or commit rape or to commit robbery or mingling poison with food, drink or medicine with intent to kill, or wilfully poisoning any well, spring or cistern of water, shall be sentenced to imprisonment for not more than fifteen years.

22-502 of the District of Columbia Code

Every person convicted of an assault with intent to commit mayhem or of an assault with a dangerous weapon shall be sentenced to imprisonment for not more than 10 years.

22-3202 of the District of Columbia Code

If any person shall commit a crim of violence in the District of Columbia when armed with or having readily available any pistol or other firearm he may, in addition to the punishment provided for the crime be punished by imprisonment for a term of not more than five years; upon a second conviction for a crime of violence so committed he may, in addition to the crime, be punished by imprisonment for a term of not more than 10 years.

UNITED STATES CONSTITUTION:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the assistance of Counsel for his defence.

U. S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAMUEL B. LEWIS

V.

UNITED STATES OF AMERICA

NO. 20,133

Reply Brief of Appellant

Sol Rosen, Esq.
1718 Eye St., N.W.
Washington, D.C. 20006
Attorney for Appellant

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TABLE OF CASES

SUMMARY ARGUMENT

The taking of the handwriting sample prior to arraignment before the Commissioner or magistrate was in violation of Rule 5a of the Federal Rules of Criminal Procedure and the MALLORY Rule. It was an error to admit it into evidence.

The admission into evidence of the handwriting sample was in violation of the privilege against Self-Incrimination as guaranteed by the 5th Amendment of the Right to Counsel as guaranted by the 6th Amendment.

TITLE OF ARGUMENT

I.

The taking of the handwriting sample prior to arraignment before the Commissioner or magistrate was in violation of Rule 5 (a) of the Federal Rules of Criminal Procedure and the MALLORY Rule. It was an error to admit it into evidence.

It is the contention of appellant that Rule 5 (a) of the Federal Rules of Criminal Procedure was violated by the conduct of the Police in not bringing the defendant Lewis before a Commissioner or Magistrate. In the Mitchell case cited by respondent, it was held clearly by this Court that,

> "It is not true that Rule 5 (a) is in effect only during business hours; we held long ago that both law and practice ... application for hearing might have been made to committing magistrate at any hour. Akowskey v. U.S. 81 U.S. App. DC 353, 354, 158 F 2d 649, 650 (1946). We recently said: Not only a magistrate but an assistant U.S. attorney, are and were ..... available to the police 24 hours a day. Jones v. U.S. 113 U.S. APP. DC 256, 307 F2d 397, 399 (1962). Compare Porter v. U.S. 103 U.S. APP. DC 380, 258 F2d 685 (1958). Cert denied 360 U.S. 906 79 S.Ct. 1289 (1959). Moreover, if because of some extraordinary circumstances no magistrate were available, it would not follow that questioning could continue. Coleman v. U.S. 114 U.S. APP. DC 185, 313 F2d 576 (1962) - Pending a hearing before a magistrate who informs the suspect of his rights the police may not carry out a process of inquiry that tends itself, even if not so designed, to eliciting damaging statements to support his arrest and ultimately his guilt. Mallory v. U.S. 354 U.S. at 454, 77 S.Ct. at 11359. Mitchell v. U.S. 114 U.S. APP. DC 353, 355."

The language of the Mitchell case is applicable to the case at hand. The defendant Lewis was required to be brought before a magistrate or Commissioner upon arrest and upon the completion of the so-called administrative "booking" process. Rule 5(a) prohibits the interrogation of the suspect for the eliciting of incriminating statements and the handwriting sample, which the government concedes was made during the period before arraignment, must be considered an incriminating statement extracted from

the appellant in violation of the Mallory rule. Thus, it was an error to admit this data into evidence. See also Otney v. U.S. 340 F2d 696 (1965) USCA 10th Cir.

II.

TITLE OF ARGUMENT

It is the contention of appellant Lewis that the handwriting sample extracted from defendant priot to arraignment was secured in violation of the 5th Amendment rights of the defendant not to be compelled to make incriminating statements and the right to counsel of the accused. That position is in accord with the most recent case on the issue, Fitzsimmons v. U.S. (No. 885) U.S. Court of Appeals (10th Circuit, Dec. 1966 term, 35LW2496, 1967.

In the Fitzsimmons case the accused was not given any warning that the signature sample that he prepared might be used against him as evidence. The government wanted the exampler for use at the trial as evidence for comparison purposes by a handwriting expert. The court, per Judge Seth, held that the record demonstrated that the exampler was obtained for purpose of creating incriminating evidence against the defendant and acknowledged by the government that it was used for a sample at the trial.

> "The nature of the evidence and the testimony so derives is no different from an oral admission by the accused that the endorsement on the stolen check was in fact made by him. The accused had an absolute constitutional right to remain silent." Escobedo v. Illinois 378 U.S. 5478 (1964); Massiah v. U.S. 377 U.S. 201 (Slip opinion Page 4).

The court observed as follows regarding the privilege against self-incrimination as guaranteed by the 5th Amendment:

> "With respect to the claim of the privilege against self-incrimination, we believe that Schmerber, reaffirms that the privilege extends to any communitative act of the defendant.

Thus, acts which are in fact communicative thereby create conditions of utmost need for the right to counsel under the 6th Amendment in the same manner as actual statements of accused.

"It is our view that the exampler of appellant's handwriting or signature as here taken and used was a communicative act performed while incarcerated and in absence of counsel. The appellant so communicated that the exampler is his handwriting or his signature....

"Thus the sample signature here admitted into evidence was unlike the body, facts of body or fingerprints of appellant because the latter are physical characteristics that owe nothing of their existence to any communicative act of appellant. The body always exists and the use of it as evidence to identify the appellant, and thereby incriminates him cannot involve compulsion to create evidence that does not theretofore exist.

"In the case at bar of the act of affixing a signature to the fingerprint form, the appellant in effect said that this was his usual signature. The testimony of the expert witness as to this evidence thus related to 'some communicative acr or writing' of appellant, a communication made in effect on interrogation. Use of appellant's signature had the same effect as an actual admission of appellant upon interrogation that the endorsement on the stolen check was made by him." (Slip opinion page 8).

The language of the Fitzsimmons case would suggest that the handwriting sample of the case at bar should likewise be cited inadmissible. The Respondent's brief fails to state any reason why the Fitzsimmons case should not be followed in this circuit. Thus the Court should rule that the handwriting sample was inadmissible. Cf. U.S. v. Serio, 367 F 2d 347 (2nd Circ.).

In addition, the Court should view the Schmerber opinion in its context of the physical intrusion of the body to secure evidence that it already is in existence. In Breithaupt v. Abrams (352 US 433), where a hypodermic needle was used to withdraw a sample of blood, the Supreme Court held that a blood test by a skilled technician is not conduct that shocks the conscious nor such a method of obtaining evidence as offends a "sense of justice". Rochis v. California 342 U.S. 165; Brown v. Mississippi, 297 U.S. 278. Schmeber v. California was a reaffirmation of the Breithaupt dogma.

CF. U.S. v. Townsend D.C. Circ. 151 F. Supp. 378 (1957); Blackford v. U.S. 247 F2d 745 9th Cir. 1957.

In addition this court should note that Breithaupt and Schmerber involve the taking of existing evidence which does not require the active cooperation of the accused. The facts at hand, and in the Fitzsimmons case, Supra, involved the cooperation of the accused to create evidence, which without the intelligent cooperation of the accused would not exist. Thus, the trial court erred in admitting into evidence the handwriting sample taken from the defendant prior to arraignment extracted in violation of his right to counsel and his privilege against self-incrimination.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,133

SAMUEL B. LEWIS, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DAVID N. ELLENHORN,
LEE A. FREEMAN, JR.,
Assistant United States Attorneys.

Cr. No. 131-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) Does the privilege against self-incrimination extend to the giving of handwriting samples?

(2) If not, may appellant seek to exclude a voluntarily furnished handwriting sample on the ground that he lacked advice of counsel and had not been arraigned?

(3) May appellant now complain about the admission of his probation report, when defense counsel expressed satisfaction with the elaborate precautions taken to conceal the nature of the document and the record contains no indication of possible prejudice?

(4) Has appellant waived his right to challenge the sufficiency of the evidence?

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*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,133

SAMUEL B. LEWIS, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The grand jury indicted appellant in three counts for assault with intent to commit robbery (22 D.C. Code § 501), assault with intent to commit robbery while armed with a pistol (22 D.C. Code § 3202), and assault with a dangerous weapon (22 D.C. Code § 502). After trial before Judge McGarraghy, the jury found appellant guilty as charged in the indictment. The lower court gave him concurrent sentences of 5 to 15 years on the first count, 20 months to 5 years on the second count, and 40 months to 10 years on the third count. This appeal ensued.

As developed through the testimony of Mrs. Hemminger and Mrs. Farran, the following events occurred on October 6, 1964: A man, identified by both witnesses as appellant, entered the office of the Federal Lithograph Company on Blair Road in Washington, D.C. He requested and received an application for employment from Mrs. Farran. During the five to eight minutes that appellant took to write out the application, Mrs. Hemminger noticed that "he was looking the place over very carefully." (Tr. 17, 37, 39, 64). When appellant had finished with the application, Mrs. Farran "went back up to him," checked over items on the form with him, including the spelling of his signature, and explained that the company would call him if a job became available (Tr. 69-70). Appellant handed her the application and left. About ten minutes later, he returned, prompting Mrs. Hemminger to remark: "Here comes that guy again." (Tr. 18). As Mrs. Farran approached the counter to wait on him, appellant brandished a revolver and announced: "This is a holdup." (Tr. 19, 52, 71) He then jumped over the counter, fired one shot in the direction of Mrs. Hemminger, and fled out the door.

Both of these witnesses were shown an exhibit at trial which they identified as the employment application that had been completed by the would-be bandit (Tr. 20-21, 72). The prosecution then introduced a handwriting sample that appellant had voluntarily furnished approximately 20 minutes after the arresting officers brought him to the police station (Tr. 113-117).[1] An officer who was present at the time appellant filled out this card explained that it was standard procedure to get another handwriting specimen whenever, as in this case, investigation had proceeded partially by means of handwriting analysis (Tr. 128). The government's next witness, a probation officer, identified appellant's handwriting on a report that he had watched appellant sign (Tr. 171).

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[1] Appellant had been arrested pursuant to a valid warrant (Tr. 117).

Having laid this foundation, the prosecution cemented its case with the testimony of a handwriting expert who had compared the writing on the employment application, the card filled out at the police station, and the probation report.[2] This expert stated that appellant had unquestionably written all three documents (Tr. 181, 273), and described in great detail the method by which he had reached this positive conclusion (Tr. 180-273).

The appellant testified in his own behalf. Though he could not account for his activities on the day of the attempted robbery because he had taken sick leave from his usual job, he denied the offenses charged.

The judge thereafter submitted the case to the jury with complete and correct instructions, including an admonition that the government had to establish beyond a reasonable doubt that appellant was present at the time and place the alleged offenses were committed (Tr. 389-390).

SUMMARY OF ARGUMENT

The privilege against self-incrimination does not apply to handwriting samples. The decision in *Schmerber* v. *California*, 384 U.S. 757 (1966), explicitly limits the protection of the privilege to enforced testimony or statements. And the giving of a handwriting sample is clearly not a communicative act within the meaning of *Schmerber*.

Since appellant had no constitutional right to refuse to furnish a handwriting specimen, he was not prejudiced by the lack of counsel or alleged delay in arraignment.

Before the prosecutor sought to introduce appellant's probation report, he alerted the trial court and defense counsel. The judge thereupon directed that portions of the document be covered so as to conceal its nature from the jury. The defense counsel registered no objection to the effectiveness of these precautions, and nothing appears in the record to indicate that the trial court was derelict.

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[2] The trial court overruled an objection to this evidence (Tr. 160).

The experienced defense counsel made no motion for judgment of acquittal, and thereby waived the right to attack the sufficiency of the evidence on appeal. In any event, the evidence amply supports the jury's verdict.

ARGUMENT

I. The privilege against self-incrimination does not apply to the giving of handwriting samples.

The recent decision of the Supreme Court in *Schmerber* v. *California*, 384 U.S. 757 (1966), reaffirms the widely-held doctrine that requiring an accused to furnish a handwriting specimen does not infringe his privilege against self-incrimination.[3] Holding that a person suspected of drunken driving could not refuse to give a blood sample, the *Schmerber* opinion stressed that the privilege against self-incrimination applies only to testimonial compulsion or enforced communication. In this respect, it noted:

> "[B]oth federal and state courts have usually held that [the privilege against self-incrimination] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, *to write or speak for identification*, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." 384 U.S. at 764 (emphasis added).

The principle enunciated and followed in *Schmerber* plainly refutes appellant's assertion that the privilege

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[3] As expressed in 8 Wigmore, Evidence § 2263 (McNaughton rev. 1961): "The privilege is limited to testimonial disclosures. It was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would thus take the place of other evidence." So defined, the privilege does not reach handwriting samples. Wigmore at § 2265(8).

against self-incrimination encompasses handwriting samples. By supplying such physical evidence appellant in no way implicated his testimonial capacities. "His participation, except as a donor, was irrelevant to the results of the [comparison], which depended on [handwriting] analysis and on that alone." 384 U.S. at 765. The shape of the letters and figures—not what he wrote—constituted the evidence against appellant. It would offend common sense to regard the giving of a handwriting sample as a communicative act or "unwilling testimonial disclosure." *People* v. *Harper*, 115 Cal. App. 2d 776, 779, 252 P.2d 950, 952 (1953).[4] Rather, it is like trying on clothing for size, *Barrett* v. *State*, 190 Tenn. 366, 299 S.W.2d 516 (1950); *Holt* v. *United States*, 218 U.S. 245, 252-253 (1910), or giving one's fingerprints for comparison. *United States* v. *Iacullo*, 226 F.2d 788, 793 (7th Cir. 1955). The procedure most closely resembles speaking for identification, which has never been thought to raise constitutional problems. For instance, *United States* v. *Chibbaro*, 361 F.2d 365, 375 (3d Cir. 1966), cited with approval in *Schmerber*, held that having witnesses view and listen to suspects talk through a one-way mirror did not violate the latter's privilege against self-incrimination. Just like his voice, a suspect's handwriting "is clearly a distinguishable physical characteristic." *State* v. *McKenna*, 35 U.S.L. Week 2497 (N.J. Super. Ct. 1967).

In short, *Schmerber* v. *California*, 384 U.S. 757 (1966), holds that the privilege against self-incrimination extends only to compelled testimony or communications. And it expressly recognizes that handwriting samples fall outside the area so protected.

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[4] Any expression to the contrary in *Fitzsimmons* v. *United States*, 35 U.S. L. Week 2496 (10th Cir. 1967), should not be followed in this circuit.

II. Since appellant could not have invoked the privilege against self-incrimination, he has no basis to complain that he gave a sample of his handwriting without advice of counsel and prior to arraignment.

The fact that taking the handwriting sample did not abridge appellant's privilege against self-incrimination vitiates his related assignments of error. Not being entitled to assert the privilege, appellant derives no greater rights from his lack of counsel. "No issue of counsel's ability to assist [appellant] in respect of any rights he did possess is presented." *Schmerber* v. *California*, 384 U.S. 757, 766 (1966). For this reason alone, appellant misplaces reliance on *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

In addition, the record conclusively shows that "appellant was not interrogated for the purpose of eliciting a confession but was merely asked to supply handwriting specimens." *Stanfield* v. *United States*, 350 F.2d 518, 520 (10th Cir. 1965). It has been held that *Escobedo* does not require the exclusion of handwriting exemplars taken under identical circumstances. *People* v. *Graves*, 49 Cal. Rptr. 386, 411 P.2d 114, 116 (1966) *(en banc)*. As Judge Traynor eloquently reasoned in *Graves*:

> "There is nothing in the language or the logic of *Escobedo*, however, to indicate that this remedy is needed if the police have not carried out a process of interrogation that lends itself to eliciting incriminating statements. Accordingly, we find no support in *Escobedo* for invoking the right to counsel to block scientific crime investigation. Reliance on handwriting examplars for expert analysis is not a substitute for thorough scientific investigation of crime but an excellent example of such investigation. To preclude police from asking for such examples would foster reliance on the very inquisitorial methods of law enforcement that *Escobedo* deems suspect."

The reasonableness of this approach needs no amplification.

Likewise, only incriminating statements extracted during a period of unlawful detention (and evidence found as a result of these statements) are made inadmissible by *Mallory* v. *United States*, 354 U.S. 449 (1957). See, *e.g.*, *Greenwell* v. *United States*, 119 U.S. App. D.C. 43, 336 F. 2d 962 (1964). The police officers obtained no such evidence from appellant. And this case does not involve the sort of conduct sought to be deterred by the exclusionary rule. Though appellant furnished the handwriting sample before arraignment,[5] that sample was not a product of the alleged undue delay in the sense required to trigger the *Mallory* doctrine. *Mitchell* v. *United States*, 114 U.S. App. D.C. 353, 357, 316 F.2d 354, 358, n. 9 (1963). Thus, the trial court properly admitted the sample into evidence.[6]

III. The example of appellant's handwriting on a probation report was properly admitted into evidence with fully appropriate safeguards.

(Tr. 160-161, 163-165, 190-191, 247)

A part of the government's case rested upon expert testimony that the handwriting on the employment application completed by the assailant matched the handwriting on the specimen appellant furnished the police and the handwriting on a probation report that appellant had filed. Before the prosecutor sought to introduce the latter document as evidence, the following colloquy occurred at the bench:

> "MR. ELLENHORN: Your Honor, the next witness we would call is a Mr. Vogt, whom you may know. He works in the Probation Office. He is be-

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[5] Since there is no constitutional bar to taking handwriting samples, appellant would not have received a warning with respect to this matter upon arraignment.

[6] Unlike the present case, the evidence in *Bynum* v. *United States*, 104 U.S. App. D.C. 368, 262 F.2d 465 (1958), would not have been discovered *but for* an illegal arrest and detention.

> ing called in this case for a purpose which I want to inform Mr. Shorter [defense counsel] and the Court about. He is being called to identify certain other samples of handwriting which were used by the handwriting expert.
>
> Now, in order to avoid bringing out the fact that the defendant was on probation, I have instructed Mr. Vogt not to mention his occupation or any other circumstances under which he saw the defendant but simply to testify that he knows the defendant and to identify certain papers as being in the defendant's handwriting.
>
> I want to inform Mr. Shorter so that it won't be brought out on cross-examination, at least, accidentally, that he works for the Probation Office or that these are probation reports, or anything of that kind." (Tr. 160-161).

The prosecutor further offered to cover up any material that indicated the documents were probation reports (Tr. 164). Consequently, the trial judge permitted the witness to identify appellant's handwriting on one of the documents, but directed "that all parts of the exhibit be blocked out in some way so that only the handwriting will be visible." (Tr. 165). Defense counsel agreed that these procedures were adequate to erase any hint of appellant's prior criminal involvement.[7]

Contrary to the position taken at trial, appellant belatedly complains that he was prejudiced by the introduction of his probation report. But the failure to press this point in the lower court precludes its assertion for the first time on appeal. *Schmerber* v. *California*, 384 U.S. 757, 765-766, n. 9 (1966); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) *(en banc)*, *cert de-*

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[7] The defense counsel preserved an objection to this evidence on the sole ground that it was confidential. The trial judge properly overruled this objection, stating: "I don't understand they are being offered to show the contents of the reports. They are being offered only to show the handwriting on the reports. In other words, there is no breach of confidentiality, if there is any confidentiality." (Tr. 163).

nied, 383 U.S. 907 (1966); *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962); *Gray* v. *United States*, 114 U.S. App. D.C. 77, 311 F.2d 126 (1962), *cert. denied*, 374 U.S. 838 (1963); *Johnson* v. *United States*, 110 U.S. App. D.C. 187, 290 F.2d 378 (1961). Since defense counsel withdrew his objection to this evidence after the adoption of protective measures by the trial court, it is obvious that he saw no danger that the document would reveal that appellant had been on probation, much less that he had a criminal record. Indeed, experienced defense counsel himself requested that copies of the handwriting on the probation report be circulated among the jury during his cross-examination of the handwriting analyst (Tr. 247).[8] See *Gill* v. *United States*, 285 F.2d 711 (5th Cir. 1961).

In any event, the record plainly shows that the reception of this evidence caused no prejudice whatever. There was no element of surprise during the course of trial. The prosecutor informed the court and opposing counsel that his next witness would identify certain probation reports as having been written by appellant. Whereupon, in order to conceal the nature of the document, the trial judge directed that it be covered so that only the handwriting remained visible. Accordingly, all references to appellant's probationary status were eliminated. The removal of these indicia effectively protected his rights. *Hardy* v. *United States*, 199 F.2d 704 (8th Cir. 1952); *Huerta* v. *State*, 390 S.W.2d 770, 772 (Tex. Crim. App. 1965). *Cf. Hilliard* v. *United States*, 121 F.2d 992, 998 (4th Cir. 1941).[9] The bald assertion that the trial court's

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[8] The expert witness had prepared photostats of (a) the employment application and (b) a random composite of certain letters and words cut out from the examples of appellant's handwriting on the police card and probation report. During direct examination, the jury received copies solely of these photostats, and the analyst limited his comparative testimony to the material appearing thereon (Tr. 190-191).

[9] The lack of objection by trial counsel distinguishes this case from *Barnes* v. *United States*, —— U.S. App. D.C. ——, 365 F.2d

precautions failed to obviate possible prejudice finds no support in the record. It should not be entertained on this appeal.

IV. The evidence was sufficient to support the jury's verdict.

(Tr. 91, 93, 331-332, 360-367)

The failure of defense counsel to move for judgment of acquittal in the trial court precludes appellant from now challenging the sufficiency of the evidence. *Battle* v. *United States*, 92 U.S. App. D.C. 220, 206 F.2d 440 (1963); *Myers* v. *United States*, 337 F.2d 22 (8th Cir. 1964); *Meeks* v. *United States*, 259 F.2d 328 (5th Cir. 1958).

But in any case, the evidence so amply supports the jury's verdict that extended discussion of this point is unnecessary. The brief for appellant erroneously assumes that appellate courts weigh the evidence and determine the credibility of witnesses.[10] On the contrary, the decision of the trier of fact must be sustained if there is substantial evidence to support it, taking the view of the evidence most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). The fact pattern put together by the two victims of the assault, their identification of appellant as the assailant, and the testimony of the handwriting expert, clearly established a case against appellant such that a "reasonable mind might

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509, 510-511 (1966). Furthermore, the facts of the two cases vastly differ. In *Barnes*, the jury was shown a "typical mug shot" of the accused. As the court remarked: "The double-shot picture, with front and profile shots alongside each other, is so familiar from 'wanted' posters in the post office, motion pictures and television, that the inference that the person involved has a criminal record, or has at least been in trouble with the police, is natural, perhaps automatic."

[10] Defense counsel brought to the jury's attention the fact that the two employees had tentatively identified another man as their assailant, and he stressed the discrepancies in the physical descriptions given by these witnesses at different times (Tr. 91, 93, 331-332, 360-367).

fairly conclude guilt beyond a reasonable doubt." *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392-93, 160 F.2d 229, 232-233, *cert. denied*, 331 U.S. 837 (1947). Indeed, it is well-settled that an accused may be convicted of robbery on the uncorroborated testimony of the complainant. *Jones* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 537 (1966); *Accardo* v. *United States*, 102 U.S. App. D.C. 4, 249 F.2d 519 (1957), *cert. denied*, 356 U.S. 943 (1958); *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DAVID N. ELLENHORN,
LEE A. FREEMAN, JR.,
Assistant United States Attorneys.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,133
(Cr. No. 131-65)

SAMUEL B. LEWIS, JR., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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APPELLEE'S SUPPLEMENTAL MEMORANDUM WITH RESPECT TO HANDWRITING EVIDENCE

Subsequent to the filing of appellee's brief, the Court of Appeals for the Second Circuit unanimously ruled that handwriting samples fall outside the scope of the privilege against self-incrimination. United States v. Braverman, No. 268 (April 4, 1967) (Moore, Friendly, Bryan). Relying on Schmerber v. California, 384 U.S. 757, 764 (1966), and Holt v. United States, 218 U.S. 245 (1910), the Braverman opinion reasoned:

> "We fail to see any significant distinction between making an accused raise his arms so that a trier of the facts can ascertain the correspondence of his torso with an incriminating garment and having him write his name so that a trier can determine the correspondence of his signature with an incriminating writing. In neither case is the accused compelled to give testimony, that is, to respond to questions regarding the circumstances of the crime or his participation in it. To such extent as Fitzsimmons v. United States, ___ F.2d ___ (10 Cir. 1967), may hold otherwise, we do not agree with it." Slip op. at 1809-1810. 1/

1/ A footnote to the opinion points out that the Supreme Court has granted certiorari in a case where petitioner asserts, inter alia, that his right to counsel was violated by the taking of a handwriting sample. California v. Gilbert, 63 Cal. 2d 670, 408 P.2d 365, cert. granted, 384 U.S. 985 (1966).

The Braverman decision reaffirms another recent holding in United States v. Serao, 367 F.2d 347 (2d Cir. 1966) (Waterman, Lumbard, Anderson).[2/] The Serao case involved a form completed in appellant's handwriting that had been procured after his arraignment in the course of routine investigation. On these facts, the Second Circuit unanimously held that none of appellant's constitutional rights were infringed since the sample "was used here merely as a handwriting standard for identification, not to communicate any information related to the issues being tried." The Second Circuit further ruled that "as [appellant] was deprived of no rights under the Fifth Amendment, presence of his counsel would have availed him nothing. He therefore has no Sixth Amendment claim" 367 F.2d at 350. For both propositions, the Serao opinion cited to Schmerber v. California, 384 U.S. 757 (1966).

Appellee would also like to draw the Court's attention to People v. Ellis, 55 Cal. Rptr. 385, 421 F.2d 393 (1966) (en banc). The California Supreme Court there unanimously interpreted Schmerber to mean that "voice identification is not within the privilege against self-incrimination." The language of Judge Traynor on that issue is highly pertinent to the status of handwriting samples:

2/ While a petition for certiorari has been filed in Serao, No. 869, it makes no challenge to the holding with respect to the use of handwriting exemplars.

The privilege against self-incrimination applies to evidence of "communications or testimony" of the accused, but not to "real or physical" evidence derived from him... The results of voice identification tests fall within the category of real or physical evidence... In such a test, the speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant... The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics such as color of eyes, hair, and skin, physical build and fingerprints.

Voice identification testimony is the product of an observable physical characteristic made by an independent witness. It is the very type of objective factual evidence, independent of information communicated by the accused, that the privilege encourages police to seek. Moreover, independent identification testimony, unlike testimonal evidence derived from the accused, raises no question of reliance on the veracity of the accused. Any attempt by a suspect to disguise his voice is apt to be detected readily by those persons present who can compare the sample with his normal voice. Furthermore, there is no risk that one could be coerced into falsely accusing himself. It is difficult to imagine how a suspect could be induced to impersonate an unknown voice to incriminate himself.

It has been urged that the privilege reflects an ultimate sense of fairness that prohibits the state from demanding assistance of any kind from an individual in penal proceedings taken against him. The privilege includes no such prohibition. Criminal proceedings are replete with instances where at least passive cooperation of an accused may be constitutionally required.

A suspect asked to speak for voice identification is not subjected to the same psychological pressures said to be generated by a demand for testimony. It is no more unfair to ask a suspect to speak for voice identification than to ask him to appear in a lineup for visual identification. The psychological pressures are reduced to the same degree, through a limitation of alternatives. Deceit is improbable; the simple choice for a guilty person is between conduct

likely to expose incriminating evidence and inferences as to guilt likely to flow from a successful refusal to participate.

A related view of the individual interest protected by the privilege focuses on the right of privacy... The Fifth Amendment right of privacy protects at least uncommunicated thoughts and has been extended to preclude compelled productions of private papers and documents... A voice test, however, contemplates no such intrusion into proviacy, no disclosure of thought or privately held information is requested. One's voice is hardly of a private nature. It is constantly exposed to public observation and is merely another identifying physical characteristic.

It thus appears that an extension of the privilege to voice identification would serve none of the purposes of the privilege. It would only exclude evidence of considerable importance when visual identification is doubtful or impossible. The masked robber, the telephone extortionist, and the attacker in the night may all seek refuge behind an extension of the privilege that would do little to further the welfare of accused persons in general. Denial of access to a pertinent identifying trait can only weaken a system dedicated to the ascertainment of truth. [Citations and footnotes omitted]

Appellee respectfully submits that the decisions herein discussed have correctly interpreted Schmerber v. California, and should be followed by this Court.

/s/ DAVID G. BRESS
DAVID G. BRESS,
United States Attorney.

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER,
Assistant United States Attorney.

/s/ LEE A. FREEMAN, JR.
LEE A. FREEMAN, JR.,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Supplemental Memorandum has been mailed to counsel for appellant, Sol Z. Rosen, Esquire, 1718 I Street, N.W., Washington, D.C. 20006, this 11th day of April, 1967.

/s/ LEE A. FREEMAN, JR.
LEE A. FREEMAN, JR.,
Assistant United States Attorney